No. 94-1489

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAUL S. RICKETTS, SR., *et al.*,

Petitioners,

—v.—

CITY OF COLUMBIA, MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF EASTERN MISSOURI, EQUAL RIGHTS ADVOCATES, NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, VICTIM SERVICES, WOMEN AGAINST ABUSE LEGAL CENTER, WOMEN'S LAW PROJECT, WOMEN'S LEGAL DEFENSE FUND, IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, *et al.*, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the American Civil Liberties Union, *et al.*, respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief; respondent has refused to consent.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and

equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Eastern Missouri is one of its local affiliates. The Women's Rights Project of the national ACLU was founded in 1971 and, since then, has participated as either direct counsel or *amicus curiae* in virtually every major sex discrimination case before this Court. Many of those cases involved the impermissible use of sexual stereotypes as a basis for government policy. This case raises that issue again in a particularly pernicious setting. Domestic violence against women has reached epidemic proportions in the United States. At a bare minimum, the victims of that violence have a right to demand equal protection from those charged with enforcing the laws. The decision below effectively denies women that right. Accordingly, this case raises issues of vital concern to the ACLU and its members.

Now in its twenty-first year, Equal Rights Advocates (ERA) is one of the country's oldest women's law centers dedicated to the empowerment of women through the establishment of their economic, social and political equality. Since its inception, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits. If this goal is to be realized, it is vital that the Equal Protection Clause continue to protect women against invidious discrimination, including facially neutral policies or practices which unfairly deny gender equality.

The National Women's Law Center (Center) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's right to equal protection under the law.

In addition, the Center has been a strong advocate, both in the courts and legislative process, on behalf of women who are subjected to domestic violence. Consequently, the Center has a deep and abiding interest in ensuring that women who have experienced domestic violence receive fair and equal treatment by law enforcement, consistent with their constitutional rights.

The NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW LDEF has been engaged on many fronts in efforts to eliminate gender-motivated violence and has participated as *amicus curiae* in numerous cases in support of the rights of women who have been the victims of domestic and other gender-motivated violence.

Victim Services is a New York City not-for-profit corporation founded in 1978 to heal the wounds of violence and to prevent victimization. Victim Services offers both emergency services, such as 24-hour crisis counseling through a hotline, transportation, food, clothing and shelter; and long-term assistance, such as housing in safe homes, individual and group counseling, and advocacy with legal, health and welfare services. With a staff of more than 600 individuals and 250 volunteers, Victim Services provides services in schools, police precincts, courts, shelters and community offices, aiding more than 140,000 victims each year, at least one-third of whom are battered women. With federal funding, Victim Services has trained law enforcement professional across the country on how properly to respond to domestic violence incidents.

The Women Against Abuse Legal Center is a nonprofit organization serving victims of domestic violence. Staff attorneys represent victims in civil proceedings to obtain and enforce protection orders. Legal Center staff also engage in systems advocacy and impact litigation designed to advance the rights of domestic violence victims on the local, state and national levels. Over 95% of Legal Center clients are women seeking protection against male batterers. It has long been our experience that many of our clients have great difficulty getting protection orders enforced by the police. Unfortunately, the police frequently treat domestic crimes as less serious than nondomestic crimes. This sends a dangerous message to the batterer that he is above the law and can assault a woman with impunity. This message invariably emboldens the batterer and may lead to an escalation of violence.

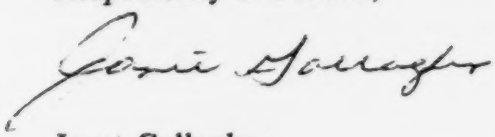
The Women's Law Project, founded in 1974, is a Philadelphia-based, nonprofit, public interest legal center dedicated to improving the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Assisting women who are victims of domestic violence, in particular, has been a major focus of both our telephone counseling service, which handles approximately 5000 calls a year, and the Law Project's litigation efforts, which include both original litigation and participation as *amicus curiae*. The Law Project is currently engaged in two advocacy efforts relating to domestic violence: (1) protecting access to insurance coverage for victims of domestic violence, and (2) a child custody and family violence project, whose purpose is to address the failure of the Philadelphia court system to assure the safety of children and women who are victims of family violence.

The Women's Legal Defense Fund (WLDF) is a nonprofit, tax-exempt, national advocacy organization founded

in 1971 to advance the rights of women in the areas of work and family. WLDF represents women and men challenging barriers to sexual equality, principally those in employment. It does do through litigation of significant cases, public education, and lobbying for improvements in the equal opportunity laws and in their interpretation.

The attached brief urges the Court to grant *certiorari* and send a clear message that this Court's settled equal protection jurisprudence remains the law of the land.

Respectfully submitted,



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INTEREST OF AMICI

The interests of *amici* are set forth in the accompanying motion.

SUMMARY OF ARGUMENT

The failure to provide victims of domestic violence treatment equal to victims of other violence has a devastating impact on women's lives. It has been estimated that between three and four million women each year are battered by husbands, boyfriends and male partners. *Domestic Violence: Not Just A Family Matter: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary*, 103d Cong., 2d Sess. (June 30, 1994)(statement of Senator Joseph Biden, Jr.). According to the U.S. Surgeon General, domestic violence is the leading cause of injury to women, causing more injuries than muggings, stranger rapes, and car accidents combined.[1]

Too often, the policies and practices of law enforcement offices have encouraged the treatment of this epidemic by the criminal justice system as a private, "family" problem, rather than as a public one. This case thus illustrates a broader national problem. Petitioners demonstrated that the City of Columbia treats victims of domestic violence differently than all other victims of violence. Nothing in this

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[1] *See* Joan Zorza, "The Criminal Law of Misdemeanor Domestic Violence, 1970-1990," 83 J.Crim.L. & Criminology 46 (1992); *see also* Antonia C. Novello, "From The Surgeon General, U.S. Public Health Service," 267 J.A.M.A. 3132 (1992)(noting that a recent study found domestic violence to be the "leading cause of injuries to women ages 15 through 44 years").

record, moreover, supports a finding that this discrimination was justified by a legitimate state purpose. Nevertheless, the court of appeals held that petitioners failed to produce evidence from which a reasonable jury could determine that the City's policy of discriminating against domestic violence victims was motivated by a discriminatory purpose.[2] *Ricketts v. City of Columbia, Missouri*, 36 F.3d 775, 780-81 (1994).

In so holding, the court cut short the evidentiary process and effectively eviscerated the constitutional right of women to bring sex-based domestic violence claims under the Equal Protection Clause by making such claims almost impossible to prove -- all based upon its failure to understand that evidence of adverse effect is one of many factors which, when taken together, may give rise to an inference of discriminatory purpose. Contrary to the apparent view of the court below, the failure to provide police services to victims of domestic violence on an equal basis with other crime victims could well arise from discriminatory motives (including reliance on harmful stereotypes). Indeed, this Court's longstanding equal protection jurisprudence makes clear that it was for the jury to determine whether a discriminatory purpose was inferable from petitioners' uncontested statistical and testimonial evidence.

Certiorari is also warranted because the Eighth Circuit's decision directly conflicts with decisions in the Third and Ninth Circuits on this important question of constitutional law. In contrast to the Eighth Circuit, both the Third and Ninth Circuits have recognized gender discrimination claims

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[2] In addition to statistical evidence, plaintiffs also provided statements of law enforcement officials which demonstrated a bias against treating domestic crimes as seriously as stranger assaults. *See* p.14, *infra*.

where police treat domestic violence differently than stranger assaults. In addition, the Eighth Circuit's failure to apply this Court's decision in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and its misreading of *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), reflects a misunderstanding of important constitutional principles.[3]

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS IN THE THIRD AND NINTH CIRCUITS RECOGNIZING GENDER DISCRIMINATION CLAIMS WHERE POLICE TREAT DOMESTIC VIOLENCE LESS SERIOUSLY THAN STRANGER ASSAULTS

In *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 197 n.3 (1989), this Court recognized that the selective denial of protective services to "certain disfavored minorities," implicitly including women, could state an equal protection claim under the Fourteenth Amendment. The Eighth Circuit's unwillingness to recognize that principle in its decision below places it squarely at odds with both *DeShaney* and at least two other circuits that have permitted inferential proof of discriminatory purpose in domestic violence cases.

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[3] *Amici* do not address in this brief the court of appeals' decision to withdraw the issue of causation from the jury, but fully adopt petitioners' argument that the court of appeals' ruling on causation departs from settled principles of general law and that the question of causation should have been a question for the jury. Petition at 12-15.

Hynson v. City of Chester, 864 F.2d 1026 (3d Cir. 1988), is particularly instructive. In *Hynson*, the Third Circuit held that, to survive a motion for summary judgment, "a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom." *Id.* at 1031.

On remand, plaintiff offered an expert's analysis and statistics reflecting, over a defined period of time, a lower level of police response to female victims of domestic violence. Similar evidence was offered in this case. Unlike the lower court here, however, the district court in *Hynson* found that

> the evidence in this case passes muster under the [the Third Circuit's] standard. Defendants argue that statistical evidence of the kind in the report of plaintiff's expert is by itself insufficient to withstand summary judgment. *Hynson* does not so hold, nor have defendants cited any controlling Supreme Court authority that does. The statistical evidence, in the context of this case, provides a basis for a reasonable jury to make the inferences required by [the Third Circuit].

Hynson v. City of Chester, 731 F.Supp. 1236, at 1240-41 (E.D.Pa. 1990). Thus, the district court in *Hynson* found the statistical evidence of differential police response sufficient to meet the second prong of the *Hynson* test; namely, "that discrimination against women was a motivating factor." *Hynson*, 864 F.2d at 1031.

The Eighth Circuit's approach in this case also differs

markedly from the Ninth Circuit's approach in *Balistreri v. Pacific Police Dep't*, 901 F.2d 696 (9th Cir. 1990). According to the Ninth Circuit, the plaintiff in that case asserted that an officer responding to plaintiff's assault complaint "allegedly stated that he did not blame plaintiff's husband for hitting her because of the way she was carrying on." *Id.* at 701 (internal quotes omitted). This record contains similar evidence. *See* p.14, *infra*. But, unlike the Eighth Circuit, the Ninth Circuit in *Balistreri* held that "[s]uch remarks strongly suggest an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women." *Id. See also Thurman v. City of Torrington*, 595 F. Supp. 1521 (D.Conn. 1984) (first reported case holding that the police policy of treating victims of domestic violence differently than victims of non-domestic violence violated the right to equal protection under the Fourteenth Amendment).

Finally, in *Watson v. City of Kansas City, Kansas*, 857 F.2d 690 (10th Cir. 1988), the Tenth Circuit held that statistical evidence showing an adverse impact on victims of domestic violence was sufficient to create an inference of an intent to discriminate based on the status of the crime of domestic violence, although the court rejected plaintiff's claim that this constituted gender discrimination. Despite this ruling on gender discrimination, *Watson* in no way supports respondent's position since, in *Watson*, the plaintiff proffered no evidence *at all* of adverse impact on women or any other evidence tending to gender-based purpose. By contrast, petitioners here adduced both statistical and testimonial evidence at trial of the policy's adverse impact on women and, by inference, of its discriminatory purpose.

II. THE COURT OF APPEALS' DECISION BELOW CONFLICTS WITH THE PRINCIPLES OF THIS COURT'S EQUAL PROTECTION JURISPRUDENCE

In *Personnel Administrator v. Feeney*, 442 U.S. 256, this Court upheld a Massachusetts law granting veterans an absolute preference in hiring in the state's civil service system. Because the class of veterans was disproportionately male, "[t]he statute [] benefit[ed] an overwhelmingly male class." *Id.* at 269. This Court nevertheless rejected Helen Feeney's claim that the facially neutral law's disparate impact on women was the result of intentional discrimination, primarily because the obvious stated and uncontested salutary purpose of the law was to reward veterans for serving their country, not to penalize women.[4]

Here, in stark contrast, the City's policy of treating domestic assaults less seriously than stranger-perpetrated assaults has no "legitimate noninvidious purpose" whatsoever; nor was any such purpose proffered by respondent.[5] In an

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[4] This is not the case in the domestic violence context. As set forth in the petition for *certiorari*, the uncontroverted statistical analysis of Dr. Eve Buzawa showed that arrests were made in 33% of all stranger assaults versus 18% of all domestic assaults (App. 927). Where offenders were present when police arrived, arrests were made in 62.2% of stranger cases versus 29.4% of domestic assaults (App. 928). Where the victim wanted an arrest made, 57.5% of the stranger assaults resulted in arrests; only 26.2% of domestic assailants were arrested when the victim sought arrest (App.928).

[5] Unlike this case, moreover, female veterans in *Feeney* were equally eligible for the preference and, as Justice Stevens noted in concurrence, "the number of males disadvantaged by Massachusett's veterans' preference (1,867,000) [was] sufficiently large -- and sufficiently close to the number of disadvantaged females (2,954,000) -- to refute the claim that the rule was intended to benefit males as a class over females as a

(continued...)

attempt at a *post hoc* rationale, respondent suggested below that a possible lack of probable cause might account for the failure to treat domestic crime as seriously as other crime. However, that *post hoc* rationale does not resolve the equal protection problem, it merely illuminates it. As this Court has held, "[c]are must be taken in ascertaining whether" a stated purpose "itself reflects archaic and stereotypic notions." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982). In *Hogan*, "there was no evidence whatever that the Mississippi Legislature has ever attempted to justify its differing treatment of men and women seeking nurses' training . . . . Indeed, the only statement of legislative purpose . . . relies upon the very sort of archaic and overbroad generalizations about women that we have found insufficient to justify a gender-based classification." *Id.* at 730 n.16. The same is true here.

For that reason, the precise argument that respondent makes here was flatly rejected by the Tenth Circuit in *Watson*, 857 F.2d 690. There, the court stated:

> We find no merit in defendants' argument. Whether or not probable cause exists is not susceptible to statistical quantification. It represents a judgment call on the part of the officer or officers at the scene taking into account the particular circumstances . . . . In the context of assaults, it is possible or perhaps even probable that officers' assessments as to whether probable cause exists are colored by

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[5] (...continued)
class." 442 U.S. at 281 (Stevens, J., concurring). Here, the class of persons disadvantaged by the law or policy is over 90% female, while the class of persons treated favorably under the law or policy (victims of stranger assaults, which receive vigorous police scrutiny and action) is over 80% male.

> whether the disturbance is domestic or nondomestic. *The determination of whether probable cause exists may be subject to the same allegedly unconstitutional policy that leads to the discrepancy in arrest rates* . . . . In other words, the determination of whether or not probable cause exists and the decision to arrest may present essentially the same issue . . . .

Id. at 695 (emphasis added). As in *Watson*, the rationale provided by the Eighth Circuit below begs the essential question: was the decision not to arrest influenced by impermissibly stereotypic notions of domestic abuse?

Nor does the rationale supplied by court of appeals -- that police may possibly have exercised their discretion in a gender-neutral way -- in any way cure the fallacy identified by the *Watson* court. The Eighth Circuit suggested: "Because of the inherent differences between domestic disputes and non-domestic disputes, legitimately different factors may affect a police officer's decision to arrest or not to arrest in any given situation." *Ricketts*, 36 F.3d at 781.

Again, this *post hoc* rationale in no way cures the discrimination and, in fact, underscores the extent to which respondent's policy is based on impermissible and harmful stereotypes. *See Hogan*, 458 U.S. at 730-31. The burden is properly on respondent to prove at trial that the "discretion" it exercised was in fact gender-neutral. Yet, in the instant case, neither respondent nor the Eighth Circuit was able to explain the City's policy on any gender-neutral ground.

This Court first dealt with the discriminatory application of a facially neutral law in *Yick Wo v. Hopkins*, 118 U.S. 356. In *Yick Wo*, the Court held that discriminatory intent could be inferred from a pattern of denying laundry licenses to all Chinese applicants and granting them to nearly all

white applicants. As is true here with respect to gender, the City was unable to proffer a legitimate reason, unrelated to race, for the discrepancy. *See also Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

By contrast, in each of the three leading cases on the issue of discriminatory purpose on which respondent relies, *Personnel Administrator v. Feeney*, 442 U.S. 256; *Washington v. Davis*, 426 U.S. 229 (1976); and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, this Court explicitly found that the statute or policy at issue had a legitimate noninvidious purpose and, in the case of *Feeney*, even a laudatory purpose. *See Feeney* 442 U.S. at 265 (the preference rewards veterans for the sacrifice of military service, eases the transition from military to civilian life and encourages patriotic service); *Davis*, 426 U.S. at 242 (test used by police department had a disparate impact on black applicants but was found effective in predicting performance; therefore, the goal of selecting qualified applicants was "within the power of government to pursue"); *Arlington Heights*, 429 U.S. at 269 (accepting the neutral motive for zoning ordinance with disparate impact on black residents offered by the Village based on the Village's "undeniabl[e] commit[ment] to single-family homes as its dominant residential land use").

In addition, in each of these three cases, this Court explicitly recognized and reaffirmed its rulings in *Yick Wo* and *Gomillion* that there are times when the disparate impact is so overwhelming, and the legitimate purpose so palpably absent, that all of the factors taken together suffice to establish a discriminatory purpose under the Fourteenth Amendment -- surely at least enough to justify submission of the question to the jury. *See Feeney*, 442 U.S. at 275 (explicitly observing that there are cases in which evidence of adverse effect is so strong that it, along with other relevant facts, "can unmask an invidious classification");

Davis, 426 U.S. at 242 (explicitly recognizing that in cases in which the disproportionate impact is so strong, the evidence "may for all practical purposes demonstrate unconstitutionality because . . . the discrimination is very difficult to explain on nonracial grounds"); *Arlington Heights*, 429 U.S. at 266 ("[s]ometimes a clear pattern, unexplainable on grounds other than race [or gender], emerges from the effect of the state action even when the governing legislation appears neutral on its face.")

Moreover, as if the uncontroverted evidence of overwhelming discriminatory impact on women were not enough, petitioners here adduced evidence at trial that bolstered the statistical evidence of the policy's disparate impact on women. As the Court stated in *Arlington Heights*, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The testimonial evidence, presented to the jury but discounted by the court, showed that various police officers in the City viewed domestic violence incidents as the fault of women who go back to their violent spouses. Thus, petitioners presented evidence of overwhelming disparate impact *plus* other relevant facts reinforcing the strong inference that the disproportionate impact on women is traceable to a discriminatory purpose.

In short, this case is much closer to *Yick Wo* than to *Feeney*. The only plausible explanation for the policy in this case is that it represents an irrational perpetuation of harmful stereotypes about the nature of the women who are victims of domestic violence, in violation of the Fourteenth Amendment. This Court should grant *certiorari* in order to clarify that the decision in *Feeney* was never intended to bar claims of gender discrimination where, as here, the policy in question has no "legitimate noninvidious purpose."

III. DOMESTIC VIOLENCE IS A TREMENDOUS PROBLEM OF GREAT PUBLIC IMPORTANCE AND IT DESERVES AND REQUIRES AS SERIOUS ATTENTION AS ANY OTHER TYPE OF CRIME

A. The Victims Of Domestic Violence Are Overwhelmingly Women

The Eighth Circuit has sanctioned conduct of law enforcement officials that has a devastating and disproportionate impact on women across the country -- physically, emotionally and financially. As respondent's own police officers conceded at trial, the vast majority of domestic violence victims in the City of Columbia are women (T.568, 734, 1232).

In 1992, a congressional report indicated that the most dangerous place for a woman to be is in her home.[6] According to researcher Richard J. Gelles of the University of Rhode Island, a violent crime is committed against a woman by her husband approximately every 15 seconds in the United States. *See* Washington Post, Mar. 27, 1995, at A4.[7] According to one national survey, violence will occur at least once in twenty-eight percent of all marriages.[8]

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[6] *See* Linda L. Ammons, "Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women," 3 J.L. & Pol'y 1, 5 (1994).

[7] *See also* "Report of the Gender Bias Study of the Supreme Judicial Court," 23 Suffolk U.L.Rev. 575, 584 (1989).

[8] Women's Action Coalition, "WAC Stats: The Facts About Women" 55 (1983). It is estimated that the number of women abused by their husbands in 1989 was greater than the number of women who married that year. *Ten Facts About Violence Against Women: Hearing on S.101-939 Before the Committee on the Judiciary on Women and Violence*, 101st Cong., 2d Sess. 78 (1990).

While police protection alone cannot solve the problem, intervention at this initial stage is crucial when probable cause exists to arrest, in order for the complementary components of the criminal justice and social services (for counseling) systems to work. If the initial arrest is not made, it is difficult or impossible for prosecutors, judges, treatment providers, and others to be able to perform their respective functions in stemming the epidemic of domestic violence. It is only when each of these components of the system works together that progress can be made.

This Court has recently recognized the seriousness of domestic violence in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. __, 112 S.Ct. 2791, 2826-30 (1992). Congress also recognized the epidemic of violence against women, including domestic violence, and enacted federal legislation to curtail it. *See generally* Violence Against Women Act of 1994, 42 U.S.C. §§13701, *et seq.* (including grants for programs to combat violent crimes against women, including domestic violence).

In striking down the abortion law's spousal notification requirement, this Court noted that "on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners." In addition to acknowledging the prevalence of violence against women, this Court made clear that domestic violence is a form of violence no less dangerous or serious to its victims than other forms of violence, stating that

> there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands . . . . Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions,

> physical confinement to the home, the withdrawal of financial support . . . .

Casey, 112 S.Ct. at 2827-28. The decision of the court of appeals below thus conflicts in principle with this Court's explicit recognition that domestic violence is a serious crime of public concern that overwhelming affects women's physical, psychological, and financial well-being.

B. Respondent's Policy Is Impermissibly Based On Archaic Views Of Women And Their Role In Marriage

In determining whether the state has acted with a discriminatory purpose using evidence of disparate impact, it is relevant to consider the historical treatment of members of the disfavored group. *Arlington Heights*, 429 U.S. at 267 (noting that the "historical background of [a governmental] decision is one evidentiary source" for determining whether invidious discriminatory purpose was a motivating factor). *See also Griffin v. School Board*, 377 U.S. 218 (1964).

An examination of the history of domestic abuse in this country demonstrates that the municipal custom of affording less protection to victims of domestic violence is deeply rooted in archaic and invidious views of women that have permeated Ango-Saxon and American law. For example, the fact that police, prosecutors, and courts treat wife abusers differently than others accused of assault reflects outmoded attitudes about the respective roles of men and women in marriage:

> Wife abuse results in large part from the gender based stereotypes that have shaped society's conception of normal and desirable male and female behavior. Men are socialized and expected to be aggressive and dominant, and women passive and submissive. Thus, the

> husband is often viewed as the master of his home with the authority to discipline his wife physically.

Carolyne R. Hathaway, "Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints," 75 Geo.L.J. 667, 673 (1986).

The record in this case reflects similarly archaic and harmful stereotypes. An officer who acted as a Columbia Police Department spokesman admitted that he told the local newspaper that "nagging wives" caused spousal abuse (T.1238). Another officer admitted that sometimes he would not make arrests for violations of *ex parte* orders, even of the victim wanted to prosecute, because "it's like painting the house and then you're going to burn it down the next day because it's no good" (T. 863). When a complaint was made about the failure to enforce the *ex parte* order against Sonny Stephens, a supervisor at the Columbia Police Department ordered nonenforcement of the order because Kimberly Stephens would probably "just go back to her man again" (T.1290-91).

Society's present attitude toward spousal abuse has been shaped by the Anglo-American common law, which traditionally placed married women in a subordinate position, subject to their husbands' dominance. The husband and wife were "regarded as one person, and her legal existence and authority [was] in a degree lost or suspended, during the continuance of the matrimonial union." *See* 1 W. Blackstone, Commentaries 442-44 ("By marriage, the husband and wife are one person in law . . . the very being or legal existence of the woman is suspended during the marriage . . . . If the wife be injured in her person or property, she can bring no action for redress without her husband's concurrence . . . .").

Legally, husband and wife were of one flesh; "but the

man was the owner of that flesh." Lawrence M. Friedman, A HISTORY OF AMERICAN LAW (2d ed. 1985). This view of women gave rise to the husband's right in the United States to "moderately chastise" his wife. *See, e.g., Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824)(first American court to declare a husband's legal right to assault and batter his wife); *State v. Black*, 59-60 N.C. (1 Win.) 266, 267 (1864)("[A] husband . . . is required to govern his household, and for that purpose the law permits him to use . . . such a degree of force as is necessary to control an unruly temper and make her behave . . . and unless some permanent injury be inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain"); *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 454 (1868)(husband "had a right to whip his wife with a switch no longer than his thumb . . . .").

In *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), three members of this Court reaffirmed the common law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states." *Id.* at 141. These views have long since been rejected by this Court in case after case. *See, e.g., J.E.B. v Alabama*, 511 U.S. __, 114 S.Ct. 1419, 1424 (1994); *Mississippi University for Women v. Hogan*, 458 U.S. at 725; *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973).

As this Court stated in *Casey*, "[o]nly one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and in-

dependent legal status under the Constitution. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). *These views of course, are no longer consistent with our understanding of the family, the individual or the Constitution.*" *Casey*, 112 S.Ct. at 2831 (emphasis added).

As one scholar has observed, although spousal abuse is now a crime in every state, archaic social attitudes and negative stereotypes have persisted and have weakened the practical effect of present laws: "Police, prosecutors, and courts tend to assign a low priority to the arrest, prosecution and punishment of spouse abusers . . . . Police responses reflect society's attitude that spousal abuse is less serious than violence between strangers and that intervention in domestic disputes is thus a waste of police time and resources." Hathaway, p.14, *supra*, at 674-75.

Evidence that a policy decision is motivated by stereotypic thinking is also proof of discriminatory intent, and is therefore constitutionally impermissible even if there is no explicit desire to cause harm or to disadvantage a group. *Hogan*, 458 U.S. 718. In *Hogan*, the stereotype of nurses as women perpetuated a stigma of inferiority. Perpetuation of a stereotype is a harm both because of the unconscious prejudicial motives that underlie it, and because of the stigmatizing harms that accompany it. *Hogan* applies with equal force here.

CONCLUSION

For the reasons stated above, *amici* respectfully urge this Court to grant *certiorari*.

Respectfully submitted,

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